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ABDUL WAHAB HASSAN & ORS v. SURUHANJAYA PILIHANRAYA MALAYSIA & ANOR

HIGH COURT MALAYA, KUALA LUMPUR
AZIZAH NAWAWI J
[JUDICIAL REVIEW NO: WA-25-327-12-2017]
B 29 JANUARY 2018

ADMINISTRATIVE LAW: *Judicial review – Certiorari – Application for leave to commence judicial review proceedings against decision of respondents – Whether available when there is alternative remedy by way of appeal – Whether there are exceptional circumstances – Elections (Registration of Electors) Regulations 2002, regs. 20(1) and 20(4)*

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The first respondent (the 'SPR') is the Election Commission of Malaysia and the second respondent is the Registrar of Electors for the State of Johore. The second respondent heard the objections to the registration of the
D proposed names in the 'Rang Daftar Pemilih Tambahan Suku Ketiga Tahun 2017' (the 'RDPT') in a public inquiry held pursuant to reg. 17 of the 2002 Regulations. The respondents then issued the *Gazette* PU (B) 503, which stated, *inter alia*, that any names given in encl. A (the 'proposed names') would be admitted into the RDPT as voters for Segamat election area. The
E applicants raised an objection to the admission of the proposed names in the RDPT. Premised on the applicants' objections, a public inquiry (the 'inquiry') was held pursuant to reg. 17 of the Elections (Registration of Electors) Regulations 2002 (the '2002 Regulations'). All objections raised by the applicants were dismissed by the second respondent. The applicants then
F filed their appeals against the decision of the second respondent pursuant to reg. 20 of the 2002 Regulations. Despite filing their appeals, the applicants also filed the present application for leave to commence judicial review proceedings to quash the inclusion of the proposed names in the RDPT. In the present application, the respondents submitted that since there was a
G statutory appeal process pursuant to reg. 20(1) of the 2002 Regulations and that the circumstances of this case did not fall within the exceptional circumstances, this application must be dismissed.

Held (granting application for leave):

H **(1)** The discretion is still with the courts to act by way of judicial review, but where there is an appeal procedure available to the applicant, *certiorari* should not normally be issued, save in exceptional circumstances. The exceptional circumstances required to be established are that: (i) the respondents had a clear lack of jurisdiction; or (ii) there was a blatant failure by the respondents to perform some statutory duty; or (iii) there
I was a serious breach of the principles of natural justice. (para 17)

(2) Subregulation 20(4) provides that the determination of the appeal under sub-reg. 20(1) shall be final and shall not be challenged or questioned in, or reversed, altered or quashed by, any court on any ground. As such, in view of the ouster clause in sub-reg. 20(4) of the 2002 Regulations with regards to the determination of the appeal, there was special circumstance which justified the granting of leave as it would be a futile attempt for the applicants to be confined only to the appeal process. (paras 24-26)

Case(s) referred to:

Chin Mee Keong & Ors v. Pesuruhjaya Sukan [2007] 5 CLJ 363 CA ***(refd)***

Government of Malaysia & Anor v. Jagdis Singh [1987] 1 CLJ 451; [1987] CLJ (Rep) 110 SC ***(refd)***

Hongkong & Shanghai Banking Corporation, Ipoh v. Rent Tribunal for Ulu Kinta & Ors [1971] 1 LNS 39 FC ***(refd)***

Iskandar Coast Sdn Bhd v. Ketua Pengarah Hasil Dalam Negeri [2017] 1 LNS 1722 HC ***(refd)***

Ketua Pengarah Hasil Dalam Negeri v. Alcatel-Lucent Malaysia Sdn Bhd & Anor [2017] 2 CLJ 1 FC ***(refd)***

Lai Cheng Cheong v. Sowaratnam Arumugam [1983] 1 CLJ 282; [1983] CLJ (Rep) 216 FC ***(refd)***

Majlis Perbandaran Pulau Pinang v. Syarikat Bekerjasama-sama Serbaguna Sungai Gelugor dengan Tanggungan [1999] 3 CLJ 65 FC ***(refd)***

National Land Finance Co-operative Society Ltd v. Ketua Pengarah Hasil Dalam Negeri [1998] 4 CLJ Supp 232 HC ***(refd)***

QSR Brands Bhd v. Suruhanjaya Sekuriti & Anor [2006] 2 CLJ 532 CA ***(refd)***

Robin Tan Pang Heng Abdullah (Mendakwa Sebagai Pegawai Awam Penang Turf Club v. Ketua Pengarah Kesatuan Sekerja Malaysia & Anor [2010] 5 CLJ 574 CA ***(refd)***

Ta Wu Realty Sdn Bhd v. Ketua Pengarah Hasil Dalam Negeri & Anor [2008] 6 CLJ 235 CA ***(refd)***

Legislation referred to:

Elections Act 1958, s. 8

Elections (Registration of Electors) Regulations 2002, regs. 17, 20(1), (4)

Federal Constitution, arts. 113(1), (2), 114, 119

For the applicant - Gobind Singh Deo, Michelle Ng, Joanne Chua & Jamie Lee; M/s JM Lee & Co

For the prosecution - Suzana Atan, Shamsul Bolhassan & Nik Azrin Zairin Nik Abdullah; SFCs

Reported by Sandra Gabriel

JUDGMENT

Azizah Nawawi J:

Application

[1] This is an application for leave to commence judicial review proceedings seeking the following orders:

A (i) A *certiorari* order to quash the admission and/or the retention of names in encl. A (the "proposed names") into "Rang Daftar Pemilih Tambahan Suku Ketiga Tahun 2017" (the "RDPT") together with any actions that arise from and/or to affirm the said RDPT by the respondents and/or their agents and/or their employees and/or their officers;

B (ii) A declaration that the admission and/or the retention of the proposed names in encl. A into RPDT 2017 is unconstitutional; and

(iii) For an order of a stay of the certification and/or the gazettement and/or enforcement of the admission and/or the retention of the proposed names in encl. A in RDPT 2017 until the final decision for this judicial review application.

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[2] The grounds of the application are:

(i) that the admission and/or retention of the proposed names is unconstitutional since it does not fulfil the requirement of art. 119 of the Federal Constitution;

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(ii) that the public inquiry to hear the objections raised by the applicants against the admission of the proposed names into the RDPT was rigged with irregularities;

E (iii) that the public inquiry violated the rules of natural justice and does not properly adopt the procedures provided in the 2002 Regulations; and

(iv) that the admission and/or the retention of proposed names in the RDPT is unreasonable and irrational.

F **[3]** During the application for leave, learned Senior Federal Counsel ("SFC") acting for the Honourable Attorney General has raised a preliminary objection that leave should not be granted as there is an alternative remedy of appeal under the 2002 Regulations.

[4] Having considered the application and the submission of the parties, G this court had dismissed the learned SFC's preliminary objection and granted the application for leave.

The Salient Facts

[5] The applicants are the registered voters in Segamat election area.

H **[6]** The first respondent (the "SPR") is the Election Commission of Malaysia constituted under art. 114 of the Federal Constitution and its functions are defined in art. 113(1) and (2) of the Federal Constitution read with the Elections Act 1958 and other relevant election regulations.

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[7] The second respondent is the Registrar of Electors for the State of Johore appointed under s. 8 of the Elections Act 1958. The second respondent heard the objections to the registration of the proposed names in the RPDT in a public inquiry held pursuant to reg. 17 of the Elections (Registration of Electors) Regulations 2002. A

[8] On 23 October 2017, the respondents have issued the Gazette PU (B) 503, which states that any names given in encl. A will be admitted into RDPT 2017 as voters for Segamat election area and will cast vote in the locality of Segamat Camp. The proposed names consisted of the names of members of the armed forces and their spouses (the "proposed voters"). B

[9] The applicants take the position that the development of Segamat Camp is not complete. Therefore, the applicants raised an objection to the admission of the proposed names in the RDPT. C

[10] Premised on the applicants' objections, a public inquiry (the "inquiry") was held pursuant to reg. 17 of the 2002 Regulations from 4 to 10 December 2017. D

[11] During the inquiry, the applicants complained that all or some of the following incidents had happened:

(i) That the inquiry was held privately. E

(ii) That the applicants were not allowed to be represented by a lawyer. However, some of the applicants were asked with legal questions.

(iii) That during the inquiry, the proposed voters were represented by an army captain.

(iv) That during the inquiry, the second respondent was clearly in favour of the proposed voters. F

(v) That the proposed voters gave no evidence that they resided in the Segamat election area.

(vi) No certificate of compliance and fitness were tendered as evidence. G

[12] All objections raised by the applicants were dismissed by the second respondent. The respondents will maintain the proposed names in the RDPT.

[13] On 12 December 2017, the applicants have filed their appeals against the decision of the second respondent pursuant to reg. 20 of the 2002 Regulations. The said appeals have been fixed for hearing on 2 to 7 January 2018. H

[14] Despite filing their appeals on 12 December 2017, the applicants have also filed this application for judicial review to quash the inclusion of the proposed names in the RDPT. I

A **The Findings Of The Court**

[15] The AG has raised a preliminary issue, that there is a special provision of appeal under reg. 20(1) of the 2002 Regulations, which reads:

> (1) Any claimant, objector, or person in regard to whom objection has been made may, if he is aggrieved by a decision of the Registrar in respect of a claim or objection, appeal to an Adjudicating Officer.

[16] Therefore, based on the following cases, the applicants should first exhaust the appeal process before filing this application:

(i) *Ketua Pengarah Hasil Dalam Negeri v. Alcatel-Lucent Malaysia Sdn Bhd & Anor* [2017] 2 CLJ 1;

(ii) *Iskandar Coast Sdn Bhd v. Ketua Pengarah Hasil Dalam Negeri* [2017] 1 LNS 1722;

(iii) *Ta Wu Realty Sdn Bhd v. Ketua Pengarah Hasil Dalam Negeri & Anor* [2008] 6 CLJ 235;

(iv) *Hongkong & Shanghai Banking Corporation, Ipoh v. Rent Tribunal for Ulu Kinta & Ors* [1971] 1 LNS 39; [1972] 1 MLJ 70;

(v) *National Land Finance Co-operative Society Ltd v. Ketua Pengarah Hasil Dalam Negeri* [1998] 4 CLJ Supp 232; and

(vi) *Robin Tan Pang Heng Abdullah (Mendakwa Sebagai Pegawai Awam Penang Turf Club) v. Ketua Pengarah Kesatuan Sekerja Malaysia & Anor* [2010] 5 CLJ 574.

[17] All the above cases share the common principle which was enunciated in the case of *Government of Malaysia & Anor v. Jagdis Singh* [1987] 1 CLJ 451; [1987] CLJ (Rep) 110; [1987] 2 MLJ 185, where the Supreme Court held that the discretion is still with the courts to act by way of judicial review, but where there is an appeal procedure available to the applicant, *certiorari* should not normally be issued save in exceptional circumstances. The exceptional circumstances required to be established by the applicants are:

(i) That the respondents had a clear lack of jurisdiction; or

(ii) That there was a blatant failure by the respondents to perform some statutory duty; or

(iii) That there was a serious breach of the principles of natural justice.

[18] However, it is the submission of the applicants that even though the applicants have filed their appeals under reg. 20 of the 2002 Regulations, the issue of alternative remedy should have been properly taken during the substantive stage. The applicants relied on the cases of *QSR Brands Bhd*

v. Suruhanjaya Sekuriti & Anor [2006] 2 CLJ 532; [2006] 3 MLJ 164 and *Lai Cheng Cheong v. Sowaratnam Arumugan* [1983] 1 CLJ 282; [1983] CLJ (Rep) 216; [1983] 2 MLJ 113, where both the Court of Appeal (in *QSR Brands*) and the Federal Court (in *Lai Cheng Cheong*) held that the issue of alternative remedy is relevant only during the substantive hearing.

[19] This very issue was also considered by the Federal Court in *Majlis Perbandaran Pulau Pinang v. Syarikat Bekerjasama-sama Serbaguna Sungai Gelugor dengan Tanggungan* [1999] 3 CLJ 65; [1999] 3 MLJ 1 and the Federal Court held as follows:

> (2) The Alternative Remedy Point
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> Did the existence of the statutory remedy of appeal and its non-exercise, in this case, exclude Judicial Review?
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> Before considering this question, we should like to make a preliminary observation regarding the stage at which the question of alternative remedies should be dealt with. There is no hard and fast rule about this. As we have said, the case of *R. v. Secretary of State for the Home Department ex p., Swati (ibid)* shows that the **existence of alternative remedies would be a ground for refusing leave** to apply for judicial review. It is also **a ground for setting aside a grant of leave** given earlier. (*R. v. Secretary of State for the Home Department ex p. Davendranath Doorga* [1990] COD 109). Again, **the alternative remedies argument may be considered at *inter partes* stage,** even if leave had been granted and not challenged (*R. v. Brentford General Commissioners, ex p. Chan* [1986] STC 65. At the final hearing stage, the court can consider the alternative remedies objection as a preliminary point ... (emphasis added)

[20] In *Chin Mee Keong & Ors v. Pesuruhjaya Sukan* [2007] 5 CLJ 363, the Court of Appeal held that the issue of alternative remedy may be raised at the application for leave. Justice James Foong (JCA) held as follows:

> [29] So the question to be asked in our instant case is whether the appellants' application is frivolous and vexatious to justify refusal of leave *in limine*. The learned Judicial Commissioner answered this in the affirmative based primarily on the fact that there exist an alternative domestic remedy for the appellant to appeal against the decision of the respondent under s. 21(1)(c) of the SD Act. But does the availability of this remedy alone justify the refusal of leave to apply for an order of *certiorari*?
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> [30] I am aware that this court in *QSR Brands Bhd v. Suruhanjaya Sekuriti & Anor* [2006] 2 CLJ 532, has gone as far as to declare:
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> > In the light of these weighty authorities, it is manifestly clear that it is only at the hearing of the substantive motion for judicial review that the existence of an alternative remedy becomes relevant. A *fortiori*, it is a matter which does not fall to be considered on a leave application.

A [31] But I am not inclined to accept such a wide proposition in the light of the authorities disclosed. This is too broad an interpretation given to the cases cited. *To summarily assign this issue of an alternative remedy to a subsequent stage for consideration after leave has been granted would, in my view, mean that even cases which are bound to fail in limine on the issue of availability of an alternative remedy would automatically be permitted at leave stage. It must* B *be reminded that there are only limited exceptions to the general rule that judicial review is not available where there is an alternative remedy by way of appeal. And to ignore this at leave stage and allow all cases of such nature to proceed to the second stage after leave is granted would go beyond established principles* particularly that of *Mohamed Nordin bin Johan v. Attorney General, Malaysia (supra)* which is a Federal Court case and the Supreme Court decision in *J.P. Berthelsen v.* C *Director General of Immigration, Malaysia & Ors* [1986]2 CLJ 409; [1986] CLJ (Rep) 160 which repeatedly states that the test is whether the application for leave is frivolous to merit the refusal of leave *in limine*. *In my view, if the issue of an alternative remedy is raised at leave stage, it must still be considered in the light of this established test rather than leaving it completely for evaluation at* D *the substantive hearing of the motion of certiorari after leave has been granted.* (emphasis added)

[21] Since the issue of alternative remedy has been raised at the leave stage, then this court will consider the same in light of the established test.

[22] In the present application, the learned SFC submits that since there is E a statutory appeal process pursuant to reg. 20(1) of the 2002 Regulations and that the circumstances of this case do not fall within the exceptional circumstances within the case of *Jagdis Singh*, then this application for leave must be dismissed. Added to that, since the applicants have also filed an appeal under reg. 20, then this application is an abuse of the process of the F court.

[23] Regulation 20 of the 2002 Regulations reads:

Appeal

20 (1) Any claimant, objector, or person in regard to whom objection has G been made may, if he is aggrieved by a decision of the Registrar in respect of a claim or objection, appeal to an Adjudicating Officer.

(2) Every appeal shall be in writing and:

(a) shall be signed by the appellant;

(b) shall state shortly the grounds of appeal; and H

(c) shall be delivered to the Adjudicating Officer together with a fee of five ringgit;

within ten days from the date of the decision in respect of which the appeal is made.

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(3) An Adjudicating Officer shall hear such appeals in public after giving not less than four clear days' written notice of the date, time and place of the hearing of the appeal to the parties concerned and may at his discretion hear any further evidence.

(4) *The determination of the appeal by the Adjudicating Officer shall, under these Regulations, be final and shall not be challenged or questioned in, or reversed, altered or quashed by, any court on any ground.*

(5) …

(6) …

(7) …

(8) … (emphasis added)

[24] Therefore, sub-reg. 20(4) provides that the determination of the appeal under sub-reg. 20(1) shall be final and shall not be challenged or questioned in, or reversed, altered or quashed by, any court on any ground.

[25] As such, in view of the ouster clause in sub-reg. 20(4) of the 2002 Regulations with regards to the determination of the appeal, it would be a futile attempt for the applicants to be confined only to the appeal process.

[26] In view of the ouster clause in sub-reg. 20(4) of the 2002 Regulations, I am of the considered opinion that there is special circumstance in this case which justifies the granting of leave.